# JULY 2013 MICHIGAN BAR EXAMINATION
# EXAMINERS' ANALYSES

## EXAMINERS' ANALYSIS OF QUESTION NO. 1

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Properties, Inc,* 270 Mich App 437, 440 (2006).

The duty a possessor of land owes to an individual depends on the individual's status on the property, which can either be a trespasser, licensee, or invitee. *James v Alberts*, 464 Mich 12, 19 (2001); *Pippin v Atallah*, 245 Mich App 136, 141 (2001). A trespasser is one who is on the property without the landowner's consent, while a licensee is "a person who is privileged to enter the land of another by virtue of the possessor's consent," *Pippin*, 245 Mich App at 142, quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596 (2000), and is normally there for social purposes. Finally, an invitee is one who is on the premises for a reason directly related to the landowner's commercial interest. *Stitt*, 462 Mich at 597-599. Here, Smith is an invitee because he was on WAF's property to purchase goods in the store.

In general a premises possessor owes a duty to invitees to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the

land. *Lugo v Ameritech Inc*, 464 Mich 512, 516 (2001). The duty does not generally encompass removal of open and obvious dangers, because the possessor of land "'owes no duty to protect or warn' of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner v Lanctoe*, 492 Mich 450, 460-461 (2012), quoting in part, *Bertrand v Alan Ford Inc*, 449 Mich 606, 611 (1995). "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id.*, at 461.

If a condition is found to be open and obvious, a duty can still arise if special aspects of the condition exist that create an unreasonable risk of severe harm. *Lugo*, 464 Mich at 517-518. The two most well known examples of special aspects are a 30 foot deep pit in the middle of a parking lot and a single exit to a business where the floor is covered with standing water, making the water "effectively unavoidable." *Id.*, at 518. If a special aspect of the condition exists, then the possessor of land must take reasonable steps to protect the invitee from the unreasonable risk of harm. *Lugo*, 464 Mich at 517; *Bertrand*, 449 Mich at 614.

Here, as noted, Smith is an invitee because he was on the property to purchase goods from WAF. As to WAF's duty, the question is whether the ice and snow in the parking lot just before the entrance to the store was an open and obvious condition about which WAF had no duty to warn. Ice and snow hazards are not always open and obvious, as invitors have a duty to exercise reasonable care within a reasonable time to diminish the hazard created by an accumulation of ice and snow. *Hoffner*, 492 Mich at 464. Nonetheless, individual circumstances and conditions can render snow and ice conditions open and obvious such that a person with ordinary intelligence would foresee the danger. *Id.*

The most accurate analysis of the facts would result in a conclusion that, when the circumstances are viewed objectively, the snow and ice conditions in the parking lot were open and obvious. There had been freezing rain the night before, it was snowing that morning, and it continued to snow when Smith arrived at the store. Additionally, Smith saw his friend Lauren

slip (but not fall) twice while walking into the store, and as a result Smith walked carefully through the parking lot into the store. Under these circumstances the slippery conditions were objectively open and obvious. See *Hoffner*, 492 Mich at 461 and *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929 (2005), rev'g 264 Mich App 99 (2004), for the reason stated by the dissent, 264 Mich App at 115-122 (noting that plaintiff saw other people holding onto side of car when exiting into the snowy parking lot).

Consequently, there was no duty for WAF to warn of the condition unless there was some special aspect to the condition. An argument can be made that the situation is similar to one of the *Lugo* examples, i.e., the condition was located at an area that was effectively unavoidable-a few feet from the store entrance. However, the better answer is that it was not effectively unavoidable, as Smith had the choice to leave before exiting the vehicle and entering the store (an option he took the night before when he did not leave his house). There was snow falling into the parking lot and at least one person was seen slipping while walking in the area. Instead of taking that option, Smith chose to traverse the parking lot and enter the store despite knowing that the conditions were slippery. *Hoffner*, 492 Mich at 472-473 ("A general interest in using … a business's services simply does not equate with a compulsion to confront a hazard and does not arise to the level of a 'special aspect' characterized by an unreasonable risk of harm.") And, it was that decision that led to his having to exit the store through the same condition. Thus, it was not effectively unavoidable, and no special aspect to this condition existed. WAF had no duty to warn plaintiff of the slippery conditions.

However, if an applicant comes to the reasonable conclusion that a duty to warn did exist because of the location of the condition, then the final question under the call of the question is whether WAF breached the duty to warn. Although this is a close question under these facts, the best answer would be that it did. The facts show that the owner was aware of the slippery conditions, and although he took steps to contact a snow removal company, he took no further, more immediate steps to warn the customers of the condition. WAF also could have salted the lot, placed a warning sign, or otherwise warned customers of the slippery condition until such

time as the snow removal company arrived and eliminated the condition.

## EXAMINERS' ANALYSIS OF QUESTION NO. 2

As to the first issue, it is well-settled that a litigant may challenge a court's subject matter jurisdiction at any time in the same civil action, even for the first time on appeal. *Kontrick v Ryan*, 540 US 443, 455 (2004). This holds true because it is always the obligation of a court to determine whether subject matter jurisdiction exists, and a party cannot waive subject matter jurisdiction by failing to challenge the jurisdiction early in the proceedings. *Ins Corp of Ireland Ltd v Compagnie des Bauxites de Guinee*, 456 US 694, 702 (1982). Consequently, even if a party loses in the trial court it may still successfully raise a lack of subject matter jurisdiction for the first time on appeal because subject matter jurisdiction cannot be waived and can be challenged at any time. *Capron v Van Noorden*, 2 Cranch 126, 127 (1804); *United Food and Commercial Worker's Union Local 919 v Centermark Properties Meridan Square Inc*, 30 F3d 298, 301 (CA 2, 1994). Accordingly, the correct answer to the first question is that the city can raise an attack on the district court's subject matter jurisdiction, even though it never challenged the removal and lost at trial.

The next question is whether the district court had subject matter jurisdiction over plaintiff's complaint. As the party that initially removed the case, the tribe has the burden to establish that federal subject matter jurisdiction exists. *Ahearn v Charter Twp of Bloomfield*, 100 F3d 451, 454 (CA 6, 1996). The tribe's removal notice was based upon 28 USC § 1441(b), which provides that "any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States, shall be removable without regard to the citizenship or residence of the parties." And, pursuant to 28 USC § 1331, federal district courts have original jurisdiction over "actions arising under the Constitution, laws or treaties of the United States." Whether federal question jurisdiction exists is determined at the time of removal. *Great Northern Ry Co v Alexander,* 246 US 276, 281 (1908); *Ahearn,* 100 F3d at 453. A claim falls within a federal court's original federal question jurisdiction "only [in] those cases in which a well-pleaded complaint establishes either that federal law creates a cause of

action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd v Construction Labors Vacation Trust*, 463 US 1, 27-28 (1983). The well-pleaded complaint rule "provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc v Williams*, 482 US 386, 392 (1987). "The [well-pleaded-complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Beneficial National Bank v Anderson*, 539 US 1, 12 (2003), quoting *Caterpillar*, 482 US at 392.

Here, the city's complaint did not allege a cause of action under federal law. Indeed, the city only alleged a nuisance resulting from violations of its own zoning ordinances and in no way sought relief under federal law. The city would not have been independently able to file this case in federal court based upon this nuisance claim.

However, in the complaint the city cited to the tribe's federal immunity, and asserted that the tribe was not entitled to assert this immunity under federal law. Is reference to this federal law enough to grant subject matter jurisdiction? No, because "it is not enough that the complaint anticipates a potential federal defense." *Caterpillar Inc*, 482 US at 393. Here, the complaint's reference to federal law only anticipates, and attempts to refute, the tribe's potential defense that it is exempt or immune from the zoning ordinances because it is a recognized tribe, and those references do not give rise to federal question jurisdiction. See *Aetna Health Inc v Davila*, 542 US 200, 207 (2004) (explaining that whether case arises under federal law "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose") and *New York v Shinnecock Indian Nation*, 686 F3d 133, 139 (CA 2, 2012). In other words, the success of the city's allegations that the tribe created a nuisance by violating city zoning ordinances does not turn on the construction of federal law. *Franchise Tax Bd*, 478 US at 808-809. Rather, the only time federal law would come into play would be as a defense to the suit, and that is not enough to create federal question jurisdiction. And, the facts of the

question reveal exactly that, as the trial court ruled on the merits of the city's allegations without the need for addressing the federal defense.

Finally, a substantial federal question was not raised by the state law claims. *Grable & Sons Metal Products Inc v Darue Manufacturing*, 545 US 308 (2005). Although it would be possible for the court to have to determine whether the tribe is entitled to sovereign immunity under federal law, when reviewing the complaint it does not appear that the city's right to relief is dependent on the construction or application of federal law. *Id*, at 312-313. For example, in *Grable* the plaintiff's state law cause of action was dependent upon having superior title, which was dependent upon what notice was required under a federal statute. Here, the legal proofs and concepts between the city's claims and whether the tribe is entitled to immunity under federal law are distinct, and so the federal issue does not raise a substantial federal question. *New York*, 686 F3d at 140-141. Complete preemption, which is rare, does not apply here because there are no "federal statutes at issue [that] provide [ ] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial Nat'l Bank,* 539 US at 8.

In summary, the proper answer is that plaintiff could challenge on appeal the district court's subject matter jurisdiction and the district court did not have jurisdiction because a federal question was not raised by the complaint.

## EXAMINERS' ANALYSIS OF QUESTION NO. 3

**Validity of the amended Articles of Incorporation** – a corporation may amend its articles of incorporation if "the amendment contains only provisions that might lawfully be contained in original articles of incorporation filed at the time of making the amendment." MCL 450.1601. A corporation is specifically permitted to amend its articles of incorporation in order to "[e]nlarge, limit, or otherwise change its corporate purposes or powers." MCL 450.1602(b). Therefore, the articles of incorporation of Brian's Bakery may be permissibly amended to include the manufacture and sale of pickles, so long as that purpose would have been lawful. Although pickle making and the other listed activities are not related to the cake baking business, dealing in pickles and pickle-related items is a *legal* enterprise and could have been included in original articles of incorporation filed at the time of making the amendment. Thus, the *topic* of the amendment is perfectly permissible.

The only remaining issue is whether the proper procedures were followed. MCL 450.1611(4) requires that notice "setting forth a proposed amendment to the articles of incorporation or a summary of the changes the proposed amendment will make" be given to each shareholder of record entitled to vote on the proposed amendment. Notice is to be given "within the time and in the manner" provided for giving notice of shareholder meetings. MCL 450.1404(1) permits notice of a shareholder meeting "not less than 10 nor more than 60 days" before the date of the shareholder meeting. Notice may be given "personally, by mail, or by electronic transmission." In this case, the 30-day notice provided to the shareholders by mail is sufficient under the statute.

The articles of incorporation are amended if the proposed amendment receives "the affirmative vote of a majority of the outstanding shares entitled to vote on the proposed amendment." MCL 450.1611(5). This is a higher voting requirement than the general requirement for shareholder approval, which is a majority of votes *cast*. MCL 450.1441(2). While these requirements "are subject to any *higher* voting requirements" specifically provided by law or contained in the articles of incorporation, the logical inference is that the voting

requirements may not be *lower* than provided in §1611(5). In this case, the facts indicate that Vicky and Rick collectively owned only 50% of the shares entitled to vote. Because the proposed amendment did not receive "the affirmative vote of a majority of the outstanding shares entitled to vote," the amendment was not validly adopted.

**Validity of stock transfer to the charitable organization** – Pursuant to MCL 450.1472(1), a restriction on the transfer of corporate shares may be imposed by "the articles of incorporation, the bylaws, or an agreement among any number of holders or among the holders and the corporation." Moreover, MCL 450.1473(a) explicitly permits transfer restrictions if the restriction "[o]bligates the holders of the restricted instruments to offer to the corporation or to any other holders of bonds or shares of the corporation or to any other person or to any combination thereof, a prior opportunity to acquire the restricted instruments." Such a restriction existed in this case, permitting the right of first refusal prior to any transfer of stock. The facts indicate that the restriction was imposed by the articles of incorporation from the time of the corporation's founding in 1998. Therefore, the transfer restriction is applicable to Brian's shares of BCB stock.

However, this does not necessarily mean that the restriction is effective against the charitable organization. Whether the restriction is effective against the charity depends upon (1) whether the restriction is "noted conspicuously" on the stock certificates Brian gave to the charity or (2) in the absence of such notation, whether the charity had actual knowledge of the existence of the restriction. MCL 450.1472(2) provides that if the restriction is "noted conspicuously on the face or back of the instrument," the restriction may be enforced against the holder or his successor or transferee. Without the notation, the otherwise enforceable restriction is "*ineffective* except against a person with actual knowledge of the restriction." Here, the facts reveal that the restriction was conspicuously placed on the face of the stock certificates, in fact it was in bold writing. Consequently, the restriction is enforceable against the charity.

## EXAMINERS' ANALYSIS OF QUESTION NO. 4

**INTRODUCTORY COMMENT**

Pat has violated several rules requiring honesty and candor. One applicable rule, MRPC 4.1, requires honesty in dealing with a third person (opposing counsel in this question). Another rule, MRPC 3.3(a)(1), requires truthfulness in dealing with a tribunal (the court in which the case was pending here). Candidates should be able to discuss the applicability of these rules to this fact pattern. Candidates should also recognize that Michigan's general rules (MRPC 8.4(b) prohibiting dishonest conduct also apply to statements or omissions to both a tribunal and third persons. Pat has also violated MRPC 1.2(a) and 1.4(a) by not conveying the initial settlement offer to his client. Other potential rule violations may also be identified by candidates.

**SPECIFIC ACTIONS**

1. Pat's response to defense counsel's initial offer of $82,500.

MRPC 4.1 provides that: "In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person." MRPC 8.4(b) prohibits conduct involving dishonesty, fraud, deceit, and misrepresentation. Rule 1.2 provides that a lawyer must abide by his client's decision whether to accept an offer.

Pat's statement that the value of the claim is easily more than $50,000 greater than defense counsel offered is not a false statement of fact. It is Pat's opinion and acceptable posturing. Similarly, Pat said "I cannot accept that." He did not say "my client won't accept that," which, even though false, may still be permissible according to some authorities. In any event, Pat's statement clearly does not represent a factual statement about the client's bottom line. The comment to MRPC 4.1 states: "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's

intentions as to an acceptable settlement of a claim are in this category." Pat's "puffing" or posturing did not amount to a false statement but the decision whether to accept a settlement offer belonged to the client.[1]

2. Pat's failure to convey the initial settlement offer to his client.

By not conveying the defendant's initial offer (of $82,500) to his client, Pat violated MRPC 1.4(a) which requires a lawyer to "keep a client reasonably informed about the status of a matter" and "notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains."[2] The offer should have been conveyed to the client especially where it was $2,500 over what the client said he was willing to accept.

3. Pat's demand letter.

MRPC 4.1 also, and most significantly on these facts, comes into play with regard to Pat's failure to inform defense counsel of his client's death. Courts and discipline agencies have held that failure to divulge the death of a client while continuing to pursue litigation on the (nonexistent) client's behalf can be dishonest or tantamount to an affirmative misrepresentation.[3] Violation of MRPC 4.1 may be predicated on silence or upon

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[1] See ABA Formal Ethics Op 06-439 (2006), opining that counsel for plaintiff "might insist that it will not agree to resolve a dispute for less than $200, when, in reality, it is willing to accept as little as $150 to put an end to the matter." Although it could be argued that the foregoing is a misrepresentation of fact with respect to counsel's actual settlement authority, such a statement was not made by Pat in this scenario. Here, Pat made no representations about what his client would accept. Instead, he stated that *he* would not accept the offer.

[2] MRPC 1.2(a) is also relevant. See *Frasco, Caponigro, Wineman & Scheible, PLLC v IGC Management, Inc*, unpublished opinion per curiam of the Michigan Court of Appeals, issued April 16, 2013 (Docket No 308405), p 2.

[3] ABA Formal Ethics Op 95-397 (1995); ABA Formal Ethics Op 06-439 (2006); *Virzi v Grand Trunk Warehouse*, 571 F Supp 507 (ED MI, 1983); *Grievance Administrator v Russell G. Slade*, ADB 150-89 (HP Report 4/11/1991), aff'd (ADB 1991); *Kentucky Bar Ass'n v Geisler*, 938 SW2d 578 (Ky, 1997).

affirmative representations in this regard.[4] Here, Pat's actions go beyond mere silence.

Pat's demand letter, sent after the death of the client without disclosing that occurrence, is "tantamount to making a false statement of material fact within the meaning of [Model] Rule 4.1(a)," which is identical to Michigan's Rule 4.1.[5] This is especially so because the demand includes compensation for future pain and suffering. The demand letter also violated Rule 8.4(b) because concealing the client's death involved dishonesty, fraud, and deceit.

4. The pretrial statement.

The pretrial statement is another instance of failure to disclose a material fact to opposing counsel and, in this instance, to the court. Pat listed the deceased client as a live witness. The pretrial statement also repeats the misrepresentation regarding future damages and adds a new express falsehood, i.e., that the client will testify. These false statements are now made to a tribunal because the pretrial statement is filed with the court. This conduct violates MRPC 3.3(a)(1), which provides that a lawyer shall not knowingly "make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Arguably, the mere filing of a paper with the court without disclosing the death of the client constitutes a violation.[6] But, listing the client as a witness and continuing to seek future damages makes the violation even more clear. Seeking future damages also violates Rule 3.1 which forbids making frivolous claims and Rule 8.4(b) which forbids conduct involving dishonesty, fraud and deceit.

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[4] *Id.* Also, the comment to MRPC 4.1 provides that: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." The comment also states that: "Making a false statement may include the failure to make a statement in circumstances in which silence is equivalent to making such a statement."

[5] ABA Formal Op 95-397.

[6] See ABA Formal Op 95-397, *Virzi*, *supra*, and the comment to the Michigan rule which states, in part: "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

5. The final negotiations.

Pat's continued negotiation immediately prior to the agreement with defense counsel is a third violation of MRPC 4.1. Each of the foregoing actions or omissions advance the unstated premise that the client would still be able to testify at trial and thereby have an impact on any award by a judge or jury, and that future damages could be properly awarded.[7]

A violation of MRPC 8.4(b) (prohibiting conduct involving dishonesty, fraud, deceit, and misrepresentation) would also be supported by these facts,[8] as well as a violation of MCR 9.104(3) (conduct that is contrary to justice, ethics, honesty, or good morals).

**OTHER RULE VIOLATIONS**

Candidates may receive additional credit for identifying and discussing a number of other rule violations.

Pat's conduct toward opposing counsel and toward the tribunal in particular would also likely be held to be prejudicial to the administration of justice, and therefore in violation of MRPC 8.4(c) and MCR 9.104(1).[9]

Additionally, it has been found that similar conduct violates a rule analogous to MRPC 3.4(a), which prohibits unlawfully obstructing another party's access to evidence.[10]

Pat may also have violated MRPC 8.4(b)'s proscription against criminal conduct if the conduct fell within the

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[7] Compare *Virzi, supra*, p 508 (defense counsel accepted mediation because he believed the deceased client would have been an excellent witness at trial).

[8] See ABA Formal Op 95-397, and *Sage, supra. Compare Grievance Administrator v Michael L. Stefani, 10-113-GA (ADB 2013), pp 10, 15.*

[9] *See, e.g., Sage, supra, and Stefani, supra.*

[10] See *In Re Forrest*, 730 A2d 340 (NJ 1999) (attorney obstructed opposing counsel's access to potentially valuable evidence when he failed to reveal client's death; attorney also served answers to interrogatories and discussed settlement after client's death).

parameters of a criminal statute pertaining to obtaining money by false pretenses, such as MCL750.218.[11]

Perhaps few candidates will perceive the applicability of these rules of professional conduct to the facts in this question. In light of the infrequency with which these particular violations have been prosecuted or discussed in ethics opinions under these facts applicants will not be penalized for failing to identify or discuss these rules.

[11] Compare *In Re Rosen* 198 P3d 116 (Colo, 2008).

## EXAMINERS' ANALYSIS OF QUESTION NO. 5

**1. Dr. Fran:** That Dr. Fran is a psychologist and not a psychiatrist does not prevent her from being qualified as an expert witness. Under MRE 702, a person can be qualified as an expert based on their skill, knowledge, experience, education or training. These various qualifications are in the disjunctive – meaning that a witness need not have all of these qualifications, just at least one. Moreover, the rule does not state any quantitative measurement of any particular qualification.

Opinions Related To PTSD

Dr. Fran's education and experience qualifies her as an expert. Under MRE 702, she would be qualified to render an opinion on PTSD and the nature and likely time element of her emotional injuries. Her opinion will assist the trier of fact "to understand the evidence or to determine a fact in issue", i.e. Deborah's mental condition and her debilitation, which is a predicate to receipt of expert testimony. Because a psychological diagnosis of Deborah is not within the common knowledge of a juror, her expertise is needed.

Opinions Related To Physical Injuries

Dr. Fran cannot, however, testify concerning Deborah's physical injuries because she is not a medical doctor. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 789 (2004) (mental health treater who was not an M.D. could not testify to medical implications of mental health diagnosis).

Dr. Fran should be allowed to testify as a mental health expert only.

**2. Jennifer:** Jennifer should not be excluded as a witness because of her relationship to Deborah. MRE 601 presumes a witness is competent to testify so long she testifies based on personal knowledge. That Jennifer is Deborah's daughter may cause her to be biased for Deborah. Yet this fact – which either party may reveal to the trier of fact – may make

her less believable once on the witness stand. But it is no argument to keep her off the witness stand. Jennifer cannot be precluded as a witness. Any bias or interest she may have will go to the weight of her testimony.

RR's lack of qualifications objection lacks merit. It must be remembered the facts say Jennifer will testify as to witnessing her mother's screaming and silence. She is a fact witness – not an expert. MRE 602. She is simply saying what she saw and heard. She is not extrapolating from what she saw and heard to an opinion as to the cause of Deborah's condition or the prognosis for recovery. Accordingly, she needs no qualifications – other than the personal knowledge she has – to testify as to what she saw and heard. RR's position would likely have merit if Jennifer were offered as an expert, which she is not.

**3. Dr. Bill:** RR prevails over Deborah's hearsay objection. MRE 801(D)(2)(1) does not categorize Deborah's statement as hearsay because (1) she is a party and (2) the statement is being offered against her. Defendant's hearsay objection would be overruled and Dr. Bill can quote Deborah's statement to him, as an admission by a party opponent.

## EXAMINERS' ANALYSIS OF QUESTION NO. 6

This question raises three issues related to breach of contract:

(1) When is one party's breach serious enough to excuse the other party from continuing to perform its contractual obligations?

(2) What conduct constitutes waiver of a party's intention to expect strict performance of a contract, and can a waiver be effectively revoked?

(3) What remedy or remedies can Zenith likely obtain on the facts provided?

## I. Legal Background:

The general rule is that when performance of a duty under a contract is due, any non-performance is a breach. *Woody v Tamer,* 158 Mich App 764, 771 (1987), citing Restatement 2d, Contracts, § 235. But the fact that one or both parties breach does not necessarily terminate the contract. Only a substantial (sometimes called "material") breach permits the nonbreaching party to declare the contract ended without becoming liable for its own nonperformance. Restatement 2d, Contracts, § 237.

In Michigan the first party who substantially breaches a contract cannot maintain an action against the other contracting party for the other's subsequent breach or failure to perform. *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 585 (2007), citing *Michaels v Amway Corp*, 206 Mich App 644, 650 (1994). A critical factor in determining whether a particular breach is substantial is "whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive [from the contract]." *Able Demolition*, at 585, quoting *Holtzlander v Brownell*, 182 Mich App 716, 722 (1990). Other factors that may be relevant to determining whether a particular breach is substantial include:

(1) the extent to which damages will adequately compensate the nonbreaching party for the lack of complete performance;

(2) the extent to which the breaching party has partly performed;

(3) the comparative hardship on the breaching party if the contract is terminated;

(4) the willfulness of the breaching party's conduct; and

(5) the degree of uncertainty that the breaching party will perform the remainder of the contract.

*Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 348 (1997), citing *Walker & Co v Harrison*, 347 Mich 630, 635 (1957). (These factors are also enumerated in Restatement 2d, Contracts, § 241.)

A party to a contract may waive contractual terms that favor it, and thus not require strict performance of the contract by the other party. *Cobbs v Fire Ass'n of Philadelphia*, 68 Mich 463 (1888). A waiver is a voluntary, intentional relinquishment of a known right. *Grand Rapids Asphalt Paving Co v City of Wyoming*, 29 Mich App 474, 483 (1971). A waiver may be proven by express language indicating a waiver or by conduct of a party that is inconsistent with a purpose to demand strict performance. *Id.* A waiver of strict performance that is not supported by consideration may be revoked as to performances that are due in the future by giving reasonable notice to the other party. *Goldblum v UAW,* 319 Mich 30, 37 (1947).

## II. Application to the Facts:

### a. Substantial Breach

The threshold question to consider is whether Zenith substantially breached the contract first, thereby barring Zenith from suing Able. Although the examiners believe that the facts are more supportive of a "No" answer, particularly on the sales goal issue, the question allows examinees to take either position. Points will be awarded based on the cogency of the

argument applying the law to the facts, not on the result advocated.

It can be argued that weekly sales reports and projections were an essential benefit of the contract to Able because the sales projections were important to Able's programming planning, and that Zenith's failure to provide these materials was a substantial breach. Able's January 2013 letter pointed to this breach as well as low sales. On the other hand, an examinee may argue that Able did not view Zenith's failures as depriving it of something it critically needed; its complaints to Zenith had emphasized insufficient sales and less consistently remarked on untimely and incomplete sales reports and projections.

Looking to the other Restatement factors used to determine whether a breach is substantial, factors (1), (4) and (5) weigh modestly in favor of Able. (1) It would have been difficult for Able to quantify the injury it suffered from not receiving timely sales reports and projections, so suing Zenith for damages would have been an ineffective remedy. (4) Zenith's repeated failures to provide timely and complete sales reports and projections, even after reminders and a stern warning, are arguably "willful conduct." (5) Zenith's history of inadequate performance creates substantial uncertainty that Zenith would perform the contract any more diligently during the rest of its term. Factor (3) strongly favors Zenith, since Able's terminating the contract is a significant economic loss for Zenith. Factor (2), the extent of part performance, is not often informative in situations that involve a series of discrete performances, as opposed to a single undertaking like a construction project. Nevertheless, it can be argued that Zenith partially performed by providing reports much of the time and did not, therefore, materially breach. In sum, an examinee could strike the balance on this particular breach in favor of either Able or Zenith.

As for Zenith's repeated failure to meet sales goals, especially after Able's letter, some examinees may conclude that this is a substantial breach. The benefit that any broadcaster expects to get from advertising sales is an adequate and dependable stream of revenue. Zenith's 2012 sales were well below the goal set in the contract, and Able's consistent complaints to Zenith underscored its importance. However, failure to meet the sales "goal" was not a breach of the

contract. The number was described as a "goal." Zenith did not promise to perform at that level, and the contract had no provision to terminate it for inadequate sales. Examinees who recognize this distinction between the goal and promise should conclude that there was no breach of this nature by Zenith, let alone a substantial breach that would excuse Able's duty to perform.

Examinees who miss the goal/promise distinction will likely go on to conclude that Zenith's unsatisfactory sales performance substantially breached the contract and will prevent Zenith from prevailing. Fewer points will likely be awarded for this conclusion because even if achieving prescribed sales were a term of the contract, it would be difficult to meet the substantial breach standard. Able's damages would be easily measured, Zenith partially performed, and Zenith's failure would not be "willful." The facts state that Zenith was making a good faith effort to meet its sales goals.

**b. Waiver**

Able's failure to insist strongly on Zenith's full performance of the weekly sales report/projections requirements during 2012 is conduct amounting to a waiver of Zenith's breaches in 2012, although no specific statement of waiver was made. (The same would be true of Able's approach to meeting the sales goals, if that were a contractual requirement.) However, Able's January 2013 letter clearly and effectively expressed its intention to require strict performance in the future. *Goldblum, supra.* At that point, Zenith could no longer rely on Able's leniency in the past. Some examinees may come to the opposite conclusion. Credit will be awarded for a well-reasoned argument.

Some examinees may analyze the question as involving a demand by Able for adequate assurance of due performance under Restatement 2d, §251. The question did not seek that response, but nearly full credit may be given if an examinee provides solid treatment of the January 2013 letter as such a demand, and Zenith's lapsing back into breach as a failure to give such assurances — and hence, a repudiation of the contract by Zenith.

c. **Remedies**

Assuming Zenith did not commit the first substantial breach, it can recover damages from Able. Ordinarily, this is the amount of money that will put Zenith in the position it would have been in had the contract been fully performed – usually called the "expectation interest." In this case that means the amount that Able would have paid Zenith for sales made between April 1, 2013, and December 31, 2013, the end of the contract term. Zenith must prove its damages with reasonable certainty, but not with mathematical exactness. It will need to introduce evidence to support its projected sales level for the rest of the year, especially if it claims its sales would have improved over its recent track record. Any expenses saved by Zenith because it did not have to perform the contract (e.g., the compensation of laid off salespersons) would be deducted from its lost revenue. Restatement 2d, Contracts, § 347(c). As the breaching party, Able must bear the risk of a reasonable degree of uncertainty as to the amount of damages. *Lopatrone v Roma Catering Co*, 20 Mich App 250 (1969).

Some applicants may raise specific performance. No points should be awarded for arguing specific performance can be ordered because Zenith would not succeed in having Able ordered to specifically perform the balance of the contract. Specific performance is unavailable because Zenith has an adequate legal remedy in damages, which can be determined with reasonable accuracy. *Ruegsegger v Bangor Twp Relief Drain,* 127 Mich App 28, 31 (1983). A point may be awarded for this correct statement of law. Applicants who assert that specific performance by Zenith cannot be ordered because the contract is a services contract also receive no points for that statement. That rule applies only to "contracts for service or supervision that [are] personal in nature," not to contracts like this one between two business entities. Restatement 2d, Contracts, §367.

## EXAMINERS' ANALYSIS OF QUESTION NO. 7

This question raises various issues related to concurrent ownership of real property as a *tenancy in common*, which is the default tenancy in Michigan. See MCL 554.44. Each co-tenant in a tenancy in common is said to own an undivided share of the whole. Thus, each tenant is entitled to possession of the whole subject to the identical rights of the other co-tenant(s). This *unity of possession* is the primary incident of the tenancy in common. Addressing the particular issues raised in this fact pattern, a proper resolution of this dispute would likely conclude:

First, Dave and Brad likely may not force Greg to cease renting the cottage in the manner in which he is currently doing it. As noted, tenants in common share possession rights, and one co-tenant may not exclude other co-tenants from the possessory rights to which they are equally entitled. Where a tenant in common is wrongfully dispossessed or excluded by another co-tenant, this is said to constitute an *ouster*. *Highstone v Burdette*, 61 Mich 54 (1886). Thus, Greg may not exclude his brothers from the use or possession of the property. Similarly, Greg cannot rent the cottage in a way that would exclude Brad or Dave from using the property. However, Greg can lease to third parties the possessory rights that he owns. See *Shell Oil Co v Estate of Kert*, 161 Mich App 409 (1987). And if he does so, Brad and Dave may not exclude the renters from shared use of the property, nor may the renters exclude Brad and Dave. See *Quinlan Inv Co v Meehan Companies, Inc*, 171 Mich App 635 (1988). The facts here do not indicate that Brad and Dave are being excluded from the property, only that they object to having to share the property with non-related third parties. Indeed, the facts specifically indicate that the renters possessed only a non-exclusive right to use the property. This is likely permissible under the tenancy that exists in this case.

Second, Greg is liable to disburse to Dave and Brad their proportionate shares of profit arising from rental income made as a result of the ownership. A co-tenant who collects rent from a third party is liable to account to the other co-tenants for their share of the net rent after reasonable expenses. *Diel*

*v Diel*, 298 Mich 127 (1941); *Miner v Lorman*, 70 Mich 173 (1888). Greg may argue that the actual costs spent maintaining the property must be proportionally shared by all co-tenants and thus may be deducted from any rental profits owed to Dave and Brad. *Eighmey v Thayer*, 135 Mich 682 (1904); *Falkner v Falkner*, 58 Mich App 558 (1975). Ultimately, though, Brad and Dave are entitled to an *accounting* and to collect their proportionate share of the net profits resulting from Greg's rentals of the property.

Third, as suggested in the preceding paragraph, Dave and Brad are liable to contribute for the costs of the septic system. The doctrine of *contribution* is an equitable doctrine requiring co-tenants in common to contribute their proportionate share of a common burden. *Strohm v Koepke*, 352 Mich 659 (1958); see also *Eighmey*, *supra*. There can be little dispute that replacing a broken septic system is a necessary expense to maintain the property for the joint use of all co-tenants. Thus, Greg is within his rights to require that his brothers proportionately share the cost of replacing the septic system.

Finally, one incident of concurrent ownership is the *right to partition*. A partition occurs where the co-tenants either divide a property into shares pursuant to their respective interests in the property ("partition in kind"), or *sell the property* for the best obtainable price and appropriately divide the proceeds. *Albro v Allen*, 434 Mich 271 (1990); *Metcalfe v Miller*, 96 Mich 459 (1893). The partition may occur by voluntary agreement of the co-tenants, or may be completed by judicial action if one of the co-tenants insists on a partition against the wishes of any other co-tenant(s). *Albro*, *supra*. Although partition in kind is favored, where a property is not susceptible to division, a sale is appropriate. *Id.* In this case, any brother may move to partition the property, and because the property at issue here is a single, non-divisible cottage, a sale is the likely outcome. Thus, although Greg cannot unilaterally sell the cottage, *Kay Inv Co, LLC v Brody Realty No 1, LLC*, 273 Mich App 432 (2006) ("no party holding title to the property as a tenant in common may sell the entire property to a third party without the consent of all other cotenants"), he may file an action for partition.

## EXAMINERS' ANALYSIS OF QUESTION 8

**The dispute over the dog and reward money.** Under Michigan law, dogs "are the property of the owner, as much as any other animal which one may have or keep." *Ten Hopen v Walker*, 96 Mich 236, 239 (1893); *Koester v VCA Animal Hosp*, 244 Mich App 173, 176 (2000). An owner of property does not lose title in that property simply because he loses it, *Cummings v Stone*, 13 Mich 70, 72 (1864); see *Doe v Oceola Twp*, 84 Mich 514, 516 (1978), only if it is abandoned. *Log Owners' Booming Co v Hubbell*, 135 Mich 65, 69 (1903). In order to abandon property, the owner must have the intent to relinquish ownership. *Id.; Van Slooten v Larsen*, 410 Mich 21, 50 (1980). There is no evidence indicating that David abandoned Murphy and, as a result, Murphy remains David's property.

David has threatened that he would sue Felix to recover Murphy. At common law, a property owner who sought return of a specific item would file a replevin action. The Michigan Legislature has codified the common law replevin action. A property owner has the right to recover specific personal property that has been "unlawfully taken or unlawfully detained," if the plaintiff has a right to possess the personal property taken or detained. MCL 600.2920(c). Accordingly, David's right to recover Murphy depends on whether Felix has unlawfully taken or unlawfully detained Murphy.

Ordinarily, a finder of personal property has a right to possess that property against all but the property's owner. *Wood v Pierson*, 45 Mich 313, 317 (1881); *Willsmore v Oceola Twp*, 106 Mich App 671, 689 (1981), superseded by statute on other grounds, *People v $27,490*, unpublished opinion per curiam of the Court of Appeals, Docket No. 173507 (Nov. 26, 1996), 1996 WL 33348190. However, if a property owner offers a reward to the finder of lost property, "a lien thereon is thereby created to the extent of the reward so offered." *Id.* The finder is entitled to detain the property from the owner "until the reward should be paid, and [is] under no legal obligation to relinquish possession to [the owner], or to give it to another, or to allow anything to be done endangering his right or security." *Wood*, 45 Mich at 318. As a result, Felix is allowed under Michigan law to detain Murphy as security until David pays him the

reward. Once David pays him the reward, however, Felix is obligated to return Murphy or be liable for conversion, *Ryan v Chown*, 160 Mich 204 (1910), as discussed in *Michigan Civil Jurisprudence, Lost, Abandoned, and Escheated Property*, § 11 (2013), even if David owes Felix "recompense for the care and expense in the keeping" of Murphy. *Wood*, 45 Mich at 317.

Examinees may also recognize that a reward for lost property is a unilateral contract and that the return of the subject property constitutes performance of that unilateral contract. See *id.*, as discussed in *Michigan Civil Jurisprudence, Lost, Abandoned, and Escheated Property*, § 10 (2013).

**The ring**. By its own terms, the Lost and Unclaimed Property Act, MCL 434.21 et seq., applies to "lost property." MCL 434.22(1). If the ring had been abandoned, and not lost, then Felix would have superior title even as to the previous owner. *Log Owners' Booming Co*, 135 Mich at 69. However, to receive title in abandoned property, Felix would have to show that the owner *intended* to relinquish ownership of the ring. *Id.* The fact that the ring was on a sidewalk implies that it had been *accidentally* dropped by its owner and, consequently, that the owner *did not* intend to relinquish ownership. Therefore, the Act applies to the ring. Under the Act, Felix must "report the finding and deliver the property to a law enforcement agency in the jurisdiction where the property is found." MCL 434.22. If he "wishes to receive the property if it is not claimed by the legal owner," Felix "shall provide his . . . name and current address to the law enforcement agency. . . ." *Id.* If the owner of the ring can be established, it will be returned to the owner. MCL 434.24(7). If the owner does not claim the ring within six months, it will be returned to the finder. MCL 434.26(1); MCL 434.25(2).

The Lost and Unclaimed Property Act created in the finder a responsibility to report lost and unclaimed property to law enforcement authorities and established a time limit for the true owner to step forward to claim his or her unclaimed property. Examinees may also recognize that previously, under Michigan common law, Felix would have had title to the ring over anyone except for the true owner. *Cummings*, 13 Mich at 72. Moreover, he would have been "bound to hold [the ring] for the true owner. . . ." *Wood*, 45 Mich at 320.

## EXAMINERS' ANALYSIS OF QUESTION NO. 9

**Claims against Melissa and Grant's Trust Interest:** The valid trust established by Denny Dolan contains a "spendthrift provision." Spendthrift provisions are valid and enforceable in Michigan. MCL 700.7502(1). This type of trust provision "restrains either the voluntary or involuntary transfer of a trust beneficiary's interest." MCL 700.7103(j); MCL 700.7502(2). Spendthrift provisions generally preclude the beneficiary's creditors from satisfying the beneficiary's debt with the beneficiary's trust interest.

However, there are several exceptions to this rule. MCL 700.7504(1)(a)-(c) states that a trust beneficiary's interest may be reached to satisfy an enforceable claim against the beneficiary where the claims involve:

(a) A trust beneficiary's child or former spouse who has a judgment or court order against the trust beneficiary for support or maintenance.
(b) A judgment creditor who has provided services that enhance, preserve, or protect a trust beneficiary's interest in the trust.
(c) This state or the United States.

**Claim against Melissa's interest:** Because Melissa owes the State of Michigan $36,000 in back taxes, and the claims of the state fall under subsection (c), the State of Michigan may reach Melissa's trust interest *despite* the spendthrift provision in order to satisfy her outstanding tax obligation.

However, the State of Michigan will *not* be able to claim the entire $36,000 all at once. MCL 700.7504(2) states that the court shall order all or part of a judgment satisfied "only out of all or part of distributions of income or principal as they become due." Because Melissa's annual trust distribution is only $30,000 per year, the most the State could recover at once is $30,000 when Melissa's distribution is paid on June 30th. The remainder of the arrearage ($6,000) can be recovered the following year.

**Claim against Grant's interest:** The Estate of Johnny Jackson will *not* be able to force a transfer of Grant's interest. The claim of the estate does not fall within the three listed exceptions listed above. This judgment creditor cannot reach Grant's annual disbursement until the money is actually transferred to Grant.

**Claim against Denny:** MCL 700.7602(1) provides "that unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust." In other words, unless the terms of the trust explicitly state that the trust is *irrevocable*, the trust is deemed *revocable*. This provision applies to the trust created by Denny Dolan because the trust was created on or after April 1, 2010. See MCL 700.7602(1)(a). A revocable trust differs from an irrevocable trust in that the settlor reserves the right to terminate the trust and recover the trust property without the consent of the trustee or a person holding an adverse interest. MCL 700.7103(h).

During the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor's creditors. MCL 700.7506(1)(a). And this is true regardless of whether the terms of the trust contain a spendthrift provision. MCL 700.7506(1).

In this case, the terms of the Dolan Family trust do not contain an express provision that the trust is irrevocable. Therefore, the trust created by Denny Dolan is revocable. And because it is revocable, the trust property is subject to the claims of Denny Dolan's creditors until Dolan dies. Because the trust is revocable, Denny's judgment creditors (his former business partners) will be able to satisfy the $100,000 judgment from the trust property.

## EXAMINERS' ANALYSIS OF QUESTION NO. 10

Defendant is arguing his Sixth Amendment right to confrontation is involved because the Sixth Amendment states in pertinent part, "In all criminal prosecutions, the accused shall enjoy…the right to be confronted with the witnesses against him." Because Defendant is being criminally prosecuted, the Sixth Amendment's confrontation clause is in play.

The prosecution seeks to introduce the statements made by Johnson through her report. Defendant claims he is entitled to cross examine or confront Johnson, the report's author and the maker of the challenged statements. Because the People seek to introduce the statements to prove the substance tested is cocaine (i.e. for their truth), the statements are hearsay.

However, Defendant has not objected under the rules of evidence but rather on constitutional confrontation clause grounds. To employ such an argument, the statements must be determined to be "testimonial hearsay" or testimonial evidence. The Sixth Amendment does not apply to non-testimonial hearsay or evidence. See *Crawford* v *Washington*, 541 US 36 (2004), requiring a classification of "testimonial" for the Sixth Amendment to apply. Once so classified, the statements are inadmissible if the statement maker is unavailable and the accused had no prior opportunity for cross examination. See *Crawford*.

Testimonial evidence includes statements made during police interrogations; ex parte testimony; affidavits; and laboratory, scientific and other reports. One test for determining whether a statement is testimonial is whether the primary purpose of the statement is to establish or prove past events potentially relevant to later criminal prosecution. Stated somewhat differently, a statement will be deemed testimonial where made under circumstances that would lead an objective person to reasonably believe that they would be available for use at a criminal trial.

Applying these principles to the facts at hand yields the conclusion that the statements made in Dr. Johnson's report are testimonial for a number of reasons. First, it is clear that

the report is not simply a statement but rather it is tantamount to an ex-parte affidavit, given it was sworn to by Johnson before a notary public. Second, the purpose for Johnson, an employee of the Michigan State Police crime lab, to test the substance was to determine whether it was cocaine. Third, the request came from the officer in charge of the ongoing prosecution of Defendant. Fourth, the results were being returned to the officer in charge of the case. These facts combine to lead clearly to the conclusion that the statements made by Dr. Johnson were testimonial in nature. See *Melendez-Diaz* v *Massachusetts*, 557 US 305 (2009).

Having determined that the evidence is testimonial, Defendant's right to confrontation can only be satisfied by confrontation. The facts suggest Johnson is not available for trial. The facts further indicate Defendant had no prior opportunity to confront Johnson. Given that (1) the evidence in question is testimonial, (2) that Johnson is unavailable, and (3) Defendant had no prior opportunity to cross-examine her, admission of the report would violate Defendant's Sixth Amendment right to confrontation.

This analysis would be unaffected by the prosecutor's argument for admission based on the report's reliability and trustworthiness. These articulations for admission were sufficient under *Ohio* v *Roberts*, 448 US 56, 66 (1980). *Crawford* overruled *Roberts* and requires confrontation to satisfy the amendment's requirements.

Some applicants may refer to MCR 6.202. This rule, effective January 1, 2013, delineates notice and demand provisions for appearance of the laboratory expert who authorized a report sought to be introduced. No applicant will lose points for not referencing this rule. The question tests the knowledge of the applicant regarding the confrontation clause, not the recent Michigan court rule's amendment. Points, however, will be assigned for reference to the rule. Without reference to the rule, an applicant can still receive a score of 10 points.

## EXAMINERS' ANALYSIS OF QUESTION NO. 11

1. Self defense justifies a person's actions, including taking another person's life. However, a person claiming self defense will be judged by the following standards. First, at the time of the killing, the accused must have had an honest and reasonable belief that she was in danger of being killed or seriously hurt. If her belief was honest and reasonable at the time, her self defense claim may be legitimate even if it turns out she was wrong. Second, a person may not kill or seriously injure another person to protect themselves from the threat of minor injury. Third, at the time she acted, she must have honestly and reasonably believed that the force used was immediately necessary. CJI 2d 7.15.

Applying these standards to our situation yields the conclusion that Debbie's self defense claim is unpersuasive. The facts show that Debbie confronted Sally with taunts more than once. Moreover, Debbie shortened the distance between herself and Sally as Sally just stood in the street. These facts contradict the predicate for Debbie's claim of self defense, i.e. that she was in fear of Sally.

Although the fighting did not really start until after the foregoing, this does not help Debbie's claim of self defense. The facts indicate that Debbie responded to Sally's comment about Hugh with anger – not fear. Anger is not a component of self defense; fear is. Moreover, once in the street, Debbie swung at Sally first, a circumstance to be considered in evaluating Debbie's self defense claim. At the point Debbie swung, Sally had done nothing to make Debbie fear her.

Based on the foregoing, Debbie's claim of self defense does not carry much weight because she had no honest and reasonable belief of death or great bodily harm. This conclusion is not altered even if the point of evaluation is the realization by Debbie she was "losing the fight." The facts are silent on what level of harm was perceived by Debbie. The facts do not indicate Sally was armed. While the facts describe the fight as a tussle, no facts suggest Debbie could not have disengaged herself from the fight, thereby undermining any claim for immediate resort to stabbing Sally. (Indeed, that she could use

one arm to grab the metal nail file from her back pocket suggests some measure of maneuverability.)

In sum, a claim of self defense is not present in these facts and the killing of Sally was not justified.

Michigan statutes regarding self defense do not call for a different conclusion. To employ statutory self defense, the individual must not be engaged in the commission of a crime when the defense was employed. MCL 780.972(1). Moreover, the individual must have the same honest and reasonable belief that the use of deadly force is necessary to prevent imminent death or great bodily harm.

Here Debbie was the aggressor and, in fact, committed a crime when she swung at Sally. Accordingly, statutory self defense is unlikely to be successful for many of the same reasons described above.

2. Because the homicide of Sally was not justified, its degree must be established by comparing the facts to the elements of first degree murder, second degree murder and manslaughter.

First degree, premeditated murder requires proof of the following elements: (1) defendant caused the death of decedent; (2) defendant intended to kill decedent; (3) the intent to kill was premeditated, i.e. thought out beforehand; (4) that the killing was deliberate, which means the accused considered the pros and cons of the killing and thought about and chose her actions before she did it. The killing cannot be the result of a sudden impulse without thought or reflection; and (5) the killing was not justified, excused or done under circumstances that reduce it to a lesser crime. CJI 2d 16.1.

The elements of second degree murder are (1) defendant caused the death of decedent; (2) defendant had one of these three states of mind: she intended to kill the decedent or she intended to do decedent great bodily harm or she knowingly created a very high risk of death or great bodily harm, knowing that death or such harm would likely result from her actions; (3) the killing was not justified, excused or done under circumstances that reduce it to a lesser crime. CJI 2d 16.5. *People v Dykehouse*, 418 Mich 488 (1984).

Manslaughter as a lesser offense to murder has the following elements: (1) first, when defendant acted, her thinking must be distinguished by emotional excitement to the point a reasonable person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been the result of something that would cause a reasonable person to act rashly or on impulse; (2) the killing must itself result from this emotional excitement and defendant must have acted before a reasonable time had passed to calm down and return to reason. CJI 2d 16.9.

The facts clearly indicate that Debbie intentionally stabbed Sally in the throat with a metal nail file and Sally died as a result. These facts, while salient, do not help distinguish the level of homicide involved. Rather, it is Debbie's mind-set that must be evaluated, along with her corresponding actions.

First degree murder is distinguished from second degree murder by the presence of premeditation and deliberation in the former and its absence in the latter. The facts suggest an absence of premeditation and deliberation for the following reasons. First, Debbie moved in increments toward Sally. Second, Debbie did not physically involve herself with Sally until Sally's taunt. Relatedly, Debbie first struck at Sally with her fist, not the nail file. Third, Debbie did not resort to stabbing Sally until the fight had commenced. Finally, while a case could be made either way, Sally's taunt may have provided the provocation which prompted Debbie to act from sudden impulse and not the deliberation necessary to support a first degree murder conviction.

Second degree murder is distinguished from manslaughter by the inclusion in the former of a malice element. The three intents described above for second degree murder comprise various forms of malice. The facts here support the conclusion that Debbie, at the very least, intended great bodily harm to Sally, if not indeed death. The weapon used and the location of the stab wound support this position.

However, the crime of second degree murder can be further reduced by the absence of malice embodied in one of the stated intents. See *People v Reese*, 491 Mich 127 (2012), citing *People v Mendoza*, 468 Mich 527, 540 (2003), in turn citing *People v*

*Scott*, 6 Mich 287, 245 (1859). In this regard, that Debbie acted as a result of the anger prompted by Sally's taunt becomes germane. Whether manslaughter, rather than murder, is suggested by the facts turns on whether Debbie's actions flow from provocation and heat of passion, circumstances that negate malice. *Mendoza*, supra. Factors to consider include the level of provocation and the timeliness of the reaction, among others.

Conclusion

While arguments of varying degrees of strength could be made to support any level of homicide, second degree murder or manslaughter establish the most likely levels of homicide. The elements of premeditation and deliberation seem wanting, eliminating first degree murder. Whether malice exists or is absent will either support or eliminate second degree murder. Given a self defense claim filled with shortcomings, manslaughter as a lesser offense of murder is likely most supportable.

## EXAMINERS' ANALYSIS OF QUESTION NO. 12

Resolution of this case depends upon whether the City was engaging in its *own* expressive conduct when it displayed the "Warriors of Honor" monument, or whether the City was providing a forum for the private speech of the Pleasantville Veteran's Association. The First Amendment provides that "congress shall make no law … abridging the freedom of speech…." The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.

If the City was engaging in its own expressive conduct, then the Free Speech Clause is simply not applicable. The Free Speech Clause restricts government regulation of *private* speech; it does not regulate *government* speech. The government is entitled to say what it wishes, and select the views that it wants to express. This is true even when the delivery of the government speech is assisted by private sources. The only constitutional limitation on government speech is that it must comport with the Establishment Clause.

If the City is providing a forum for private speech, then the City is strictly limited in its ability to regulate private speech on public property. Persons have strong free speech rights when they venture into public streets and parks, which are considered "traditional public fora." The government is permitted to place reasonable time, place, and manner restrictions on private speech so long as the regulation is (1) content neutral (2) narrowly tailored to serve a significant government interest and (3) leaves alternate channels of communication open. If the regulation is not content neutral, any restriction must satisfy strict scrutiny – it must be necessary to achieve a compelling governmental interest and be narrowly tailored. Viewpoint restrictions on private speech are prohibited.

Permanent monuments displayed on public property typically represent government speech, even if the monuments are privately financed and donated. Governments have long used monuments to speak to the public. Because parks play an important role in defining a City's identity, cities may be selective in accepting

donated monuments and may choose those that portray what the government decisionmakers view as appropriate.

Public forum principles do not apply in the context of donated monuments. The forum doctrine applies where a government property or program is capable of accommodating a large number of public speakers *without defeating* the essential function of the forum. However, public parks cannot accommodate unlimited numbers of monuments. If the government had to maintain viewpoint neutrality in selecting donated monuments, it would either result in cluttered parks or the removal of all monuments. Because a forum analysis "would lead almost inexorably to closing of the forum," it is inappropriate.

The "Warriors of Honor" monument clearly represents government speech. It was selected consistently with the City's selection criteria, the City controlled the message of the monument by exercising "final approval authority" over its selection, and the City had complete ownership of the monument. Because the monument represents government speech, the Free Speech Clause is not implicated. Therefore, Greg Gonnga is unlikely to prevail in his suit against the City.

The question and analysis is based on *Pleasant Grove City, Utah v Summum*, 555 US 460 (2009).

## EXAMINERS' ANALYSIS OF QUESTION NO. 13

The fact pattern presented generally follows the facts in *Thomason v Contour Fabricators, Inc*, 255 Mich App 121 (2003), *modified in part and remanded*, 469 Mich 960 (2003). The facts present a close question as to the ultimate answer of whether this type of injury falls within the statute's coverage, as exemplified by the fact that the trial magistrate in *Thomason* found the injury compensable, the Michigan Workers' Compensation Appellate Commission disagreed, 2001 ACO #191, the Michigan Court of Appeals reversed the Appellate Commission and reinstated benefits, and the Michigan Supreme Court affirmed that result but modified the Court of Appeals' decision and remanded to the Commission. Given the closeness of the question, the ultimate answer itself is not important, as opposed to the examinee's knowledge of the correct analysis to be used in arriving at a conclusion.

To be covered by Michigan's workers' compensation statute, an injury must be one "arising out of and in the course of employment." MCL 418.301(1). While this statutory coverage formula was in the past envisioned as perhaps stating only one inquiry, *Simkins v GMC,* 453 Mich 703, 713 n 14 (1996), the more recent view is that this statutory formula contains two components. The injury must be one "arising… in the course of employment" and the injury must be one "arising out of" employment. *Thomason,* 469 Mich 960; *Ruthruff v Tower Holding Corp (on reconsideration)*, 261 Mich App 613 (2004), *remanded* 474 Mich 1100 (2006). The "in the course of" component relates to the time, place, and circumstances of the injury. *Appleford v Kimmel*, 297 Mich 8, 12 (1941); see also, *Hill v Faircloth Manufacturing Co,* 245 Mich App 710 (2001), *review granted*, 465 Mich 949, *vacated*, 466 Mich 893 (2002); *Ledbetter v Michigan Carton Co*, 74 Mich App 330 ( 1977). Also, there is a statutory presumption that injuries occurring at the work premises during normal work hours are injuries sustained in the course of employment. MCL 418.301(3). "However, not every injury that occurs in the course of a plaintiff's employment is an injury that arises out of his employment." *Hill, supra*; see also, *Ruthruff,* 261 Mich App at 618. The determination of whether an injury "arises out of" employment is typically made by considering whether the injury resulted from a risk of

employment. *Hill, supra*. This can require assessment of whether the employer benefited in some sense from the employee's activity at the time of injury. *Thomason,* 255 Mich App 121. In *Thomason*, the case upon which the question is based, the increased goodwill to the employer from the work force was found to be an employer benefit.

Here, the examinee is expected to: know the "arising out of and in the course of employment" coverage formula; recognize the formula requires a two prong inquiry; conclude the "in the course of employment" prong is satisfied; and, evaluate the risk and/or employer benefit of the employee's activity in addressing the "arising out of" prong.

## EXAMINERS' ANALYSIS OF QUESTION NO. 14

**1) Is there a contract between Smith Tire Company and Super Bikes, Inc. for the 1,000 tires?**

The first issue is whether Smith Tire Company and Super Bikes, Inc., have a contract for 1,000 tires. The threshold question is whether the UCC or common law applies. The UCC applies to the sale of goods. Goods are defined as all things which are movable at the time of identification to the contract. MCL 440.2105. Here, the contract pertains to the sale of tires. Tires are movable and therefore considered a good. Therefore, the UCC applies.

The next issue is whether Super Bikes, Inc. made a firm offer under MCL 440.2205. The first element of a firm offer is that there must be an offer. An offer is a manifestation of a willingness to enter into a contract made in such a way that the offeree knows that assent is all that is necessary to cement the deal. It must be definite which means that the terms, especially price and quantity, must be specified. Super Bikes, Inc. wanted to buy 1,000 tires for $300 per tire for a total contract price of $300,000. Because we know how many tires were needed and the amount each one cost, the terms of the contract are definite.

The offeror, Super Bikes, Inc., must also be committed to the contract. This means that it had to show a willingness to enter into the contract with Smith Tire Company. Here, the language of Super Bikes, Inc.'s letter said that it "offers to buy" the tires. This language is not an inquiry. It is indicative of a distinct desire to purchase tires from Smith. Therefore, there is commitment.

Lastly, in order to have a valid offer, the offer must be communicated to the offeree (Smith Tire Company). The offeree has to have known about it and understood it. Here, the facts indicate that as soon as Ms. Smith received the letter, she gave it to her production manager in order to immediately begin the manufacturing process. She understood the magnitude of the order and knew that he had to begin working on it right away.

If she did not comprehend this, she would not have sent it to her production manager. Therefore, the offer was communicated to the offeree. Because the offer was definite, committed and communicated, there was an offer.

Next MCL 440.2205 requires that the offer be made by a merchant. Merchant is defined as a person who deals in goods of the kind involved in the transaction. Super Bikes, Inc. is a well-known manufacturer of motorcycles. It is in the business of manufacturing and selling motorcycles. Therefore, it qualifies as a merchant.

A firm offer also requires that the offer has to be in a signed writing. Signed includes any symbol executed or adopted by a party with the present intention to authenticate a writing. MCL 440.1201(39). Here, the facts indicate that the letter was initialed by Larry Jones, the president of the corporation. The president of the corporation has the ability to enter into contracts on behalf of the entity. It does not matter that only the initials were supplied. Any symbol qualifies as long as there was intent to authenticate the writing. By initialing the letter with the order that was on company letterhead, Mr. Jones had the intent to authenticate the writing. Therefore, the signature requirement is met. In addition, writing includes printing, typewriting, or any other intentional reduction to tangible form. MCL 440.1201 (46). Here we are dealing with a piece of paper with words either typed or written on it. This paper, the letter, is touchable. Therefore, there was a writing.

Next, a firm offer requires that the offeror included assurances that it will be held open. This means that the offer must have language in it indicating that it will not expire for a period of time or that it is firm. The language of the offer stated that the offer was "firm and would not expire until May 30, 2012." Since the letter stated that it would not lapse for a particular period, the assurance requirement is met.

Because the requirements of a firm offer have been satisfied, the offer is not revocable, for lack of consideration, for the time stated. The time period of irrevocability cannot exceed 3 months. MCL 440.2205. Here the offer was received on March 1, 2012 and the expiration date was May 30. This is within the 3 month limitation. Thus, the offer

would not be revocable for the time stated. Super Bike, Inc.'s revocation on the evening of May 29, 2012 via the voicemail message was ineffective to terminate the power to accept.

Further, there was a bargained for exchange between Smith Tire Company and Super Bikes, Inc. Smith would produce and sell the tires, and Super Bikes, Inc. would pay $300,000 for the goods. Although consideration is not necessary, under these facts, there was consideration and examinees should be given credit for noting this. Therefore, there was a contract between Smith Tire Company and Super Bikes, Inc. for 1,000 tires.

**2) Who has the risk of loss and why?**

A shipment contract occurs when the seller is required to send the goods to the buyer and the contract does not require him to deliver them at a particular destination. The seller fulfills his delivery obligations when he gets the goods to the common carrier, makes reasonable arrangements for the delivery and notifies the buyer of the shipment. See MCL 440.2504. In this case, the contract indicated that Smith Tire Company was to use Allied Freight to transport the tires to Super Bikes, Inc. The terms of the contract stated FOB -West Bloomfield. Since Smith Tire Company is located in West Bloomfield, this is deemed to be a shipment contract. Mr. Smith got the tires to Allied Freight, promptly faxed Super Bikes, Inc. notice of the shipment along with all the documents necessary to enable Super Bikes, Inc. to obtain possession of the tires. Smith Tire Company's delivery obligations were complete.

Super Bikes, Inc. may argue that since the goods were destroyed en route, that Smith Tire Company was in breach for failure of delivery. This argument will fail. Neither Smith Tire Company nor Super Bikes, Inc. were to blame for the accident that destroyed the contents of the Allied truck. The agreement of the parties regarding the risk of loss controls. Here, the contract is silent on who bears the risk of loss. The general rule is that the risk of loss is on the seller until it completes its delivery obligation. Once completed, the risk of loss shifts to the buyer. Here, Smith Tire Company completed its delivery obligations. Therefore, the risk of loss falls upon Super Bikes, Inc.

## EXAMINERS' ANALYSIS OF QUESTION NO. 15

**Spousal Support**: An award of spousal support must be just and reasonable under the circumstances of the individual case. MCL 552.23; *Maake v Maake*, 200 Mich App 184, 187 (1993). The objective of awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished. The factors that the trial court should weigh when ordering spousal support are (1) the past relations and the conduct of the parties; (2)the length of the marriage; (3) the ability of the parties to work; (4) the source of and the amount of property awarded to the parties (5) the ages of the parties; (6) the ability of the parties to pay spousal support; (7) the present situation of the parties (8) the needs of the parties; (9) the health of the parties; (10) the prior standard of living of the parties (11) whether either party is responsible for the support of others; (12) the general principals of equity. *Parrish v Parrish,* 138 Mich App 546, 554 (1984). **NOTE: Courts must make findings on each factor that is relevant to the claim before it. *Sparks v Sparks*, 440 Mich 141, 159 (1992). Therefore, the examinee need only list the factors that are pertinent to the fact pattern.**

Past Relations of the Parties: This factor includes how the parties conducted their marriage as well as the conduct contributing to the breakdown of the marriage (fault). *Hanaway v Hanaway*, 208 Mich App 278 (1995). Here, Mike has been having an affair for 5 years. Fault is only one factor, and it should not be given disproportionate weight. However, his past conduct is the reason for the divorce.

Length of the Marriage: The parties have been married for 30 years. This is a long-term marriage. Sally has spent more than half of her life married to Mike.

The Ability to Work: Sally has the ability to work, but she is going to need time to refresh her professional skills as a nurse. This will require more education, prior to conducting a job search.

The Ages of the Parties: Sally is 58 and Mike is 60. Entering the work force at age 58 is will be difficult for Sally. Many people at this age are contemplating retirement.

Ability to Pay: Sally will argue that Mike is a pilot for a private airline earning $400,000 per year. He has more than enough money to be able to comfortably support himself and will easily be able to pay spousal support.

The Needs of the Parties: Sally took herself out of the work force during this 30 year marriage assuming the primary noneconomic role of mother and homemaker. Mike assumed the economic role of taking care of the family. Sally currently has no marketable skills and will need educational training before re-entering the workforce. She will likely be reduced to a lower standard of living as a result of the divorce. She has a minimal chance of finding a job that can adequately support her. Thus, she will need spousal support to assist with her financial survival.

Prior Standard of Living: This couple is accustomed to living with a high income. They are able to afford a home with beach access and have a boat that is located at the yacht club. Sally's opportunity to earn a meaningful income is small. Once divorced, Sally will not be able to maintain this lifestyle unless she receives some support.

Responsibility for Supporting Others: All the children are over the age of 18. So neither party has any responsibility for supporting them.

General Principles of Equity: The court will balance income, needs and abilities. *Parrish v Parrish*, 138 Mich App 546, 554 (1984). Sally has no income. There is great economic disparity between Sally and Mike. It is highly unlikely she will ever achieve the earning capacity Mike enjoys, even if she refreshes her nursing skills. Mike can reasonably afford to pay spousal support to her because his $400,000 annual income is more than sufficient.

All of the above relevant factors favor Sally receiving spousal support from Mike. In particular, his high income, fault in the matter, and her need for financial support and educational training make an extremely strong case for her to

receive spousal support. Without it, she will almost certainly be impoverished.

**Jurisdiction:** On the date of filing for a divorce, one of the parties must have resided in Michigan for at least 180 days and resided in the county of filing for at least 10 days. MCL 552.9 (1); *Stamadianos v Stamadianos*, 425 Mich 1 (1986).

Here, Sally and Mike currently reside in Ingham County. However, within the next month they are to move to Van Buren County. Sally has two choices. Because she has lived in Ingham County for 30 years, she clearly satisfies the residency requirement there and can immediately file for divorce in Ingham County. If she moves to Van Buren County, she will need to wait 10 days there prior to filing for divorce in order to meet the residency requirement.